

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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LEONNA JAMES,

Plaintiff-Appellant,

v

TCF NATIONAL BANK, a/k/a TWIN CITY  
FINANCIAL, a/k/a GREAT LAKES BANK  
CORPORATION, and POWER GIBSON,

Defendants-Appellees.

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UNPUBLISHED

September 18, 2003

No. 240483

Wayne Circuit Court

LC No. 01-108451-CL

Before: Smolenski, P.J., and Murphy and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants' motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff works as a teller for defendant TCF National Bank. Defendant Power Gibson is the assistant manager at plaintiff's branch. On February 2, 2001, plaintiff entered the office of Dwon Jones, the branch manager, to ask a question. Gibson was in the office at the time. Plaintiff alleged that as Gibson left the office he placed his hand on her breast and gave her a slight push. The next day plaintiff submitted a written statement concerning the incident. Plaintiff and Gibson continued to work at the same branch.

Plaintiff filed suit alleging that defendants violated the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq.*, by engaging in sexual harassment. She alleged that she was subjected to unwanted sexual conduct from Power, that her complaints to management produced no results, and that defendants' failure to take remedial action resulted in a hostile work environment.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that no genuine issue of fact existed as to whether plaintiff was subjected to a hostile work environment. Defendants contended that plaintiff could not establish a *prima facie* case of sexual harassment, and that she could not rely on a single, isolated incident to create a hostile work environment. Finally, defendants alleged that plaintiff had no basis for imputing liability to her employer because TCF investigated the incident and took remedial action. The trial court

granted defendants' motion, finding that the incident at issue did not establish a prima facie case of sexual harassment.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2002).

Under the ELCRA, an employer may not discriminate on the basis of sex, and this also prohibits sexual harassment. *Chambers v Tretco, Inc*, 463 Mich 297, 309; 614 NW2d 910 (2000). Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature if: (1) submission to the conduct or communication is made a term or condition, either explicitly or implicitly, to obtain employment; (2) submission to or rejection of the conduct or communication is used as a factor in determining the individual's employment; or (3) the conduct or communication has the purpose or effect of substantially interfering with an individual's employment by creating a hostile environment. MCL 37.2103(i); *Chambers, supra* at 309-310.

To establish a claim of sexual harassment based on a hostile work environment, an employee must show by a preponderance of the evidence that the employee belonged to a protected group, that the employee was subjected to conduct or communication on the basis of sex, that the employee was subjected to unwelcome sexual conduct or communication, that the unwelcome conduct or communication was intended to or did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment, and the existence of respondeat superior. *Id.* at 311.

The determination whether a hostile work environment was created is based upon whether a reasonable person, under the totality of the circumstances, would have perceived the conduct at issue as substantially interfering with his or her employment or as having the purpose or effect of creating a hostile, intimidating, or offensive employment environment. *Burns v Detroit (On Remand)*, 253 Mich App 608, 627; 660 NW2d 85 (2002), mod in part on other grounds 658 NW2d 468 (2003). A single incident of sexual harassment is generally insufficient to constitute a hostile work environment; however, a single incident may be sufficient if it is severe and perpetrated by an employer in a closely-knit working environment. *Radtke v Everett*, 442 Mich 368, 372; 501 NW2d 155 (1993).

Plaintiff argues that the trial court erred by granting defendants' motion for summary disposition. We disagree and affirm the trial court's decision. To establish a prima facie case of sexual harassment, plaintiff was required to show that she was subjected to unwelcome conduct of a sexual nature that had the effect of substantially interfering with her employment by creating a hostile environment. *Chambers, supra* at 309-310. The triggering event on which plaintiff's complaint was based was the single incident that occurred on February 2, 2001. Plaintiff testified at her deposition that Gibson touched her in an inappropriate manner on only that occasion, and that she did not believe that the touching was done in a sexual manner.

In response to defendants' motion for summary disposition, plaintiff submitted an affidavit in which she asserted that the touching was done in a sexual manner. A party cannot create an issue of fact by submitting an affidavit that contradicts prior testimony that was clear and unequivocal. *Kaufman & Payton, PC v Nikkila*, 200 Mich App 250, 256-257; 503 NW2d 728 (1993). Whether a hostile work environment is created by unwelcome sexual conduct is

judged under the reasonable person standard and in light of the totality of the circumstances. *Burns, supra* at 627. A single incident of sexual harassment can create a hostile work environment if it is severe and perpetrated by an employer in a closely-knit working environment. *Radtke, supra* at 372.

In *Radtke*, the plaintiff's employer, with whom plaintiff worked alone, physically restrained her for more than one minute while he tried to kiss her. *Id.* at 375-376. The *Radtke* Court found that under the totality of the circumstances a reasonable person could conclude that such an incident could create a hostile work environment. *Id.* at 395-396. However, the *Radtke* Court observed that the same conduct perpetrated by a co-worker might not create a hostile environment. *Id.* at 395. Here, the trial court correctly found that under the totality of the circumstances a reasonable person could not conclude that the single incident of conduct alleged by plaintiff was sufficiently severe to create a hostile work environment, and properly concluded that plaintiff could not establish a prima facie case of sexual harassment as a matter of law. Summary disposition was proper.

Affirmed.

/s/ Michael R. Smolenski  
/s/ William B. Murphy  
/s/ Kurtis T. Wilder